92-310

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SHIRLEY O'QUINN, Petitioner

v.

WEDCO TECHNOLOGY, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Can a federal court, ***after*** removal on diversity grounds, vitiate a state trial court proceeding which was consistent with the State Supreme Court's interpretation of a procedural rule as applied to a limitations statute, ***by following*** the United States Supreme Court's contrary interpretation of the identically-worded federal rule and ***dismiss*** a litigant's claim?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SHIRLEY O'QUINN, Petitioner

v.

WEDCO TECHNOLOGY, INC., Respondent

The Petitioner, **SHIRLEY O'QUINN**, respectfully prays that a Writ of Certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled proceedings on February 11, 1992.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Tenth Circuit dated May 11, 1992, denying Petition For Rehearing. Not published and reprinted in the Appendix p. 1a.

The Order and Judgment of the Court of Appeals for the Tenth Circuit dated February 11, 1992, affirming the United States District Court for the District of Colorado. Not published and reprinted in the App. p. 2a.

The Judgment of the United States District Court for the District of Colorado dated December 21, 1990, granting Respondent's Motion for Summary Judgment. Not published and reprinted in the App. p. 4a.

The Memorandum Opinion and Order of the United States District Court for the District of Colorado dated December 14, 1990, dismissing Petitioner's Complaint.

Opinion published as O'Quinn v. Wedco Technology, Inc., 752 F. Supp. 984 (D.Colo.1990). Reprinted in the App. p. 5a.

The Minute Order of the United States District Court for the District of Colorado dated April 1, 1991, denying Petitioner's Motion to Alter or Amend Judgment. Not published and reprinted in the App. p. 10a.

The Notice of the El Paso County District Court of Colorado granting O'Quinn until September 28, 1988, to complete service dated August 31, 1988. Not published and reprinted in the App. p. 11a.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1441 the Respondent removed the case from the El Paso County District Court of Colorado to the United States District Court for the District of Colorado. After summary judgment was entered by the United States District Court in favor of Respondent dismissing Petitioner's Complaint, appeal was timely taken to the United States Court of Appeals for the Tenth Circuit which entered an Order and Judgment on February 11, 1992, affirming the Order of the United States District Court. A Petition for Rehearing was timely filed by the Petitioner on February 24, 1992, which was denied by the Court of Appeals on May 11, 1992.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, and RULES INVOLVED

The following federal constitutional provision is involved in this case:

Constitution of the United States, Article III, Section 2:

"The judicial power shall extend...to Controversies... between Citizens of different States...."

The following federal statute is involved in this case:

Federal Removal Statute; 28 U.S.C. § 1441 (See App. p. 18a for text.)

The following state statute is involved in this case:

Colorado Statute of Limitations; C.R.S. § 13-80-127.5 (See App. p. 18a for text.)

The following Federal Rules of Civil Procedure are involved in this case:

a) Rule 3 (See App. p. 19a for text.)
b) Rule 4(j) (See App. p. 19a for text.)
c) Rule 15(c) (See App. p. 19a for text.)
d) Rule 81(c) (See App. p. 20a for text.)

The following Colorado Rules of Civil Procedure are involved in this case:

a) Rule 3 (See App. p. 21a for text.)
b) Rule 15(c) (See App. p. 21a for text.)

STATEMENT OF THE CASE

The relevant facts and procedural history of this case are undisputed.

Shirley O'Quinn's hand was crushed in a machine, and her claim for relief arose, on May 18, 1985. She filed a products liability Complaint against Doe Corporation on April 22, 1988, in the El Paso County District Court of Colorado (State Court).

The applicable Colorado Statute of Limitations was

C.R.S., § 13-80-127.5, and any action commenced after May 17, 1988, was time barred. (App. p. 18a)

On May 16, 1988, O'Quinn filed her first Amended Complaint naming Wadell Equipment Manufacturing, Inc., as the Defendant. After numerous attempts to serve Wadell through the New Jersey Secretary of State's office, O'Quinn determined no such entity existed, and therefore no service was completed.

On August 31, 1988, the State Court sent written notice to O'Quinn's counsel pursuant to a Court Delay Prevention Plan stating:

> "You are directed to make progress by: completing service and filing proof of service or explain in writing what difficulties you are having...."
>
> "This case will be reviewed again on September 28, 1988, to see if the above-directed information has been filed with my clerk...." (App. p. 11a)

On September 23, 1988, O'Quinn filed her second Amended Complaint naming Wadell Machine and Tool, Inc., as Defendant and served Wadell that same day. On September 23, 1988, the Respondent, Wedco Technology, Inc. (Wedco) received actual notice of the lawsuit when a Wedco vice-president learned of the lawsuit from a Wadell employee.

Asserting that it had no relationship to the company that manufactured the machine O'Quinn was operating when she was injured, Wadell moved for summary judgment. The State Court granted the motion on April 11, 1990, but simultaneously granted O'Quinn leave to file and serve an amended complaint to add Wedco and allege its relation to Wadell: "Because the Plaintiffs have experienced difficulty in gaining information concerning the nature of the corporation at the time of the manufacture of the machine allegedly causing injury...." (App. p. 14a) Filing and service

on Wedco were accomplished on June 4, 1990.

On June 6, 1990, Wedco, pursuant to 28 U.S.C., § 1441, removed the case to the United States District Court for the District of Colorado (District Court). (App. p. 15a) The District Court accepted jurisdiction under 28 U.S.C. § 1332, diversity of citizenship.

On July 13, 1990, Wedco filed a Motion for Summary Judgment in District Court asserting that O'Quinn's claim was barred by the Colorado Statute of Limitations because the last Amended Complaint under Federal Rules of Civil Procedure could not relate back to the original or first Amended Complaint, both filed before the statute of limitations expired, because the notice to Wedco (September 23, 1988) was too late.

O'Quinn opposed the motion asserting that Colorado state law applied and that the "period provided by law for commencing the action" includes "a reasonable time" to effectuate service or give notice to Wedco and further that both actual notice to Wedco and service on Wedco were within the time allowed by the State Court in its August 31, 1988, Notice and April 1, 1990, Order.

The District Court granted Wedco's Motion and dismissed O'Quinn's Complaint in a Judgment dated December 21, 1990 (App. p. 4a) and in a Memorandum Opinion and Order dated December 14, 1990 (App. p. 5a, and published as *O'Quinn v. Wedco Technology Inc.*, 752 F. Supp. 984 [D.Colo., 1990]).

It is submitted that the District Court's decision was based upon a three-fold rationale: federal law applied; the Colorado Supreme Court (its court of last resort) would reverse its previous decision and follow the federal rule if it were to consider the issue again; and that, even if the Colorado Supreme Court would follow its prior decision, the notice Wedco received slightly over four months after the statute of limitations ran was "beyond a reasonable time."

The District Court held that the Colorado Supreme Court's decision in *Dillingham v. Greely Publishing Co*, 701 P.2d 27 (Colo. 1985), which held that Colorado Rule of Civil Procedure 15(c) includes a reasonable time for service, was not binding on the District Court and that "if the Colorado Supreme Court considered the question today, the court again would follow the applicable federal rule" as interpreted in *Schiavone v. Fortune*, 477 U.S. 21 (1986), which held that federal rule 15(c) does not include a reasonable time for service. The District Court said:

> "The parties' briefs center on which should apply, the federal or state rule. Because I conclude that the result would be the same applying either rule, I need not decide that issue."
>
> "I note, however, that most courts that have considered this question, including this court, have concluded that this is a question of federal procedure...Therefore, under *Hanna v. Plummer*, 380 U.S. 460 (1965), it is governed by the federal rules...the more widely held and , we submit, the correct view is that *Hanna v. Plummer* is dispositive of the issue and that the matter is procedural, not within *Erie*, and one solely of federal practice under Rule 15(c)."

O'Quinn filed a Motion to Alter or Amend the Judgment of the District Court which was denied on April 1, 1991. (App. p. 10a) From that Order an appeal was timely taken to the United States Court of Appeals for the Tenth Circuit (Tenth Circuit). Without reasoning or citation of authority the Tenth Circuit affirmed the decision of the District Court on February 11, 1991. (App. p. 2a) O'Quinn filed a Petition for Rehearing on February 24, 1992, and this was denied by the Tenth Circuit in its order dated May 11, 1992. (App. p. 1a). From that Order O'Quinn files this Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

SUMMARY

This Writ of Certiorari should be granted to enable this Court to consider a constitutional question of importance in the ***protection of federalism*** as it relates to the judicial branches of the National vis a vis State governments; to clear up ***conflicting decisions*** between the Colorado Supreme Court, the Tenth Circuit, and this Court; and to discourage the improper use of ***forum shopping*** in removal cases.

IMPORTANCE OF FEDERALISM QUESTION

The first great structural principle of American Constitutional Law is the doctrine of Federalism. In the United States, Federalism embraces several elements including the provision of each center of government ("National Government" and the autonomous "States") with the complete apparatus of law enforcement, both executive and judicial.

Article III, Section 2 of the U.S. Constitution provides that "The judicial power shall extend to Controversies between Citizens of different States."

The Constitution established a system of government in which total power, and sovereignty, was not unequivocally lodged in one level of government. In Chief Justice John Marshall's words, "Our complex system [presents] the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only enumerated powers, and of numerous state governments which retain and exercise all powers not delegated to the Union...." Naturally, in such a system, "contests respecting power may arise." *Gibbons v. Ogden*, 9 Wheat. 23 (1824).

This ebb and flow, or struggle, between the two forces of the same "Nation"; and also the United States Supreme Court's role in this living thing was ironically summed up by

Chief Justice Taney on the eve of the War Between The States in *Ableman v. Booth*, 21 How. 506 (1859):

> "This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government...So long...as this constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force."

For 96 years our federal courts struggled with the effects of the decision in *Swift v. Tyson*, 16 Pet. 1 (1842), that federal courts exercising diversity jurisdiction need not, in matters of general jurisprudence, apply the non-statutory laws of the State. Dissatisfaction with *Swift v. Tyson* was almost always present within and without the Supreme Court until it was finally totally overruled in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

However, even *Erie v. Tompkins* has not resolved all of the problems related to judicial federalism; which is evident here in O'Quinn. Questions remain in the federal courts about the differences between "substantive" vs. "procedural" law; about the effect of the Rules Enabling Act, 28 U.S.C., § 2072; about ensuring "decisions on the merits" vs. "pleadings games"; and about whether the "just determination" of a case is an important consideration.

The District Court's decision in O'Quinn to vitiate the State Court's proceedings and override the clear holding of the Colorado Supreme Court's interpretation and application of Colorado's own procedural rules and statute of limitations law is an example of how the tentacles of erosion of federalism keep appearing. This Court has an opportunity in O'Quinn to make a definitive statement and give direction to the lower

federal courts with respect to the application by those courts of state decisional law in diversity and removal cases.

CONFLICT OF DECISIONS

The Tenth Circuit, in affirming the District Court's decision in O'Quinn, has rendered a decision in conflict with a decision of Colorado's court of last resort on the same matters. The Colorado Court's decision regarding the interpretation and application of their state rules of civil procedure as they apply to their state statute of limitations is in direct conflict with a contrary decision of this Court interpreting an identical federal rule of procedure.

The Tenth Circuit has also decided an important question regarding the application of Colorado state law in a way that conflicts with a long line of applicable decisions of this Court.

The discussion herein of the "merits of question" clearly show these conflicts and the need for this Court's direction and authoritative voice.

DISCOURAGE IMPROPER FORUM SHOPPING

The history of the federal removal statute (now 28 U.S.C. § 1441), as applied in diversity cases, shows it was intended to ensure a party could fairly litigate the merits of their case rather than be prejudiced by a state court which may favor the local litigant. The rules concerning choice of forum must necessarily be construed to further the policy goal of fair litigation based on the merits of the claim at bar.

It is inappropriate to use forum selection procedure (especially when it is solely the defendant's choice) to deprive a litigant of the opportunity to litigate the merits of their case. Arguably, in O'Quinn, the Defendant Wedco removed to federal court to obtain summary judgment based upon a procedural technicality and violated the very underpinnings

of choice of forum policy. Removal legislation, and the Federal Rules of Civil Procedure, were not intended to deprive a litigant of their cause of action simply by means of choice of forum.

MERITS OF QUESTION

SUMMARY:

O'Quinn, acting in good faith, and with specific approval through a Notice from the Colorado State Court, gave actual notice to Wedco within a reasonable time after filing her Complaint in State Court. Under the holding of Colorado's highest Court in *Dillingham*, this constituted "commencing the action" for purposes of coming within the applicable 3-year period of the Colorado Statute of Limitations. Because the actual notice related back to the original time of filing the Complaint, O'Quinn's State Court action was legally postured for determination on the merits.

The case was then removed to the United States District Court for the District of Colorado, and pursuant to Fed.R.Civ.P. 81(c), the federal rules took effect only from that point forward. The District Court took the case as it was then legally postured. Under federal decisional law the District Court had no right to apply federal court interpretations to either federal rules or state rules of procedure to deny O'Quinn her day in court; which had previously been preserved in State Court.

This is analogous to moving college players at half time in the Rose Bowl game on a grass field with O'Quinn's team leading 8 to 7 (on a two-point conversion) to the Super Bowl on an artificial turf field with professional rules and then making the score 6 to 7 because they don't allow 2-point conversions in the pros.

ARGUMENT:

Justice Rovira was well aware, in writing for the Colorado Supreme Court in *Dillingham*, of the interpretation by several federal courts of Fed.R.Civ.P. 15(c) later made uniform in the federal courts by the United States Supreme Court in *Schiavone*:

> "In so holding, the Court of Appeals joined those federal courts interpreting the identical federal rule, including the tenth circuit, which have held that the language 'within the period provided by law for commencing the action' specified in 15(c) refers to the applicable statute of limitations..."
>
> "...'such a literal interpretation is unjustified, in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not receive actual notice of the action against him prior to the running of the statute of limitations'..."
>
> "We agree that such a result is anomalous and is not required by the rule...Colorado is among those jurisdictions where timely service of process can be effected after the statute of limitations has run...(generally, filing of a pleading or a motion is effective to stop the running of specified time limitations). Therefore, we hold that notice 'within the period provided by law for commencing the action' specified in C.R.CP. 15(c) includes the reasonable time allowed for service of process." *Dillingham*, 701 P.2d at 31 and 32." (Emphasis added)

This language of the Colorado Supreme Court is clear, well thought out, unambiguous, and decisive. Applied to the case at bar, O'Quinn effected service of process (or at least actual notice to Wedco) within a reasonable time because it was within the time granted by the State Court.

In direct contradiction to this State Court ruling and Colorado Supreme Court holding, the District Court held that the Colorado Supreme Court, if confronted with the issue again, would overrule *Dillingham* and follow *Schiavone;* and even if they didn't, four months after the statute of limitations expired for actual notice to Wedco was beyond a reasonable time.

> "I conclude that if the Colorado Supreme Court considered the question today, the court would follow the applicable federal rule. That rule now is expressed by *Schiavone,* not *Ingram."*

In furtherance of the great doctrine of Federalism, the United States Supreme Court has held that a federal court may not speculate as to what a state supreme court may do in the future with respect to a previous interpretation of a state law. *Meredith v. Winter Haven,* 320 U.S. 228 (1943).

For good measure, if there was any doubt, or crack left open, in Justice Rovira's *Dillingham* opinion, it was sealed shut with the November 1991 change in the Federal Rules of Civil Procedure adding Rule 15(c)(1) which basically follows the rationale in *Dillingham.* This rule change provides that the newly added defendant may receive notice within the period of time allowed for service and it can relate back.

This Court has repeatedly held that a state's courts are the final arbiters of the state's own laws. In determining state law the decisions of the state's highest court are accorded the greatest weight and must be accepted by federal courts as authoritative on state law, unless it can be said with assurance that the state's highest court itself will not follow the decisions in the future. *West v. Conrail,* 481 U.S. 35 (1987); *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980); *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Herb v. Pitcairn,* 324 U.S. 117 (1945); *Williams v. Kaiser,* 323 U.S. 471 (1945); *Sage Stores Co. v. Kansas,* 323 U.S. 32 (1944); *Moore v. Illinois R. Co.,* 312 U.S. 630 (1941); and *West v. American Telephone & Telegraph Co.,* 311 U.S. 223 (1940).

This Court held in *Walker*, 446 U.S. at 750-752:

> "There is no indication that the Rule [3] was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the federal rules begin to run, but does not effect state statutes of limitations."
>
> "Rule 3 and Okla. Stat., Tit. 12, Sec. 97 (1971) can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict."

In *West v. Conrail*, 481 U.S. at 39, this Court said in a footnote:

> "When the underlying cause of action is based on state law, and federal jurisdiction is based on diversity of citizenship, state law not only provides the appropriate period of limitations but also determines whether service must be affected within that period. *Walker v. Armco Steel Corp....* Respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in a diversity suit 'be considered part and parcel of the statute of limitations.'"

It is submitted that, from a legal standpoint, O'Quinn is identical to Walker at the point immediately after "removal". We ask this Court to extend Walker to cover the type of situation presented in O'Quinn.

If the Supreme Court sees that a state's "service requirements which are an integral part of the statute of limitations" should control in an action based on state law which is filed in federal court under diversity jurisdiction—then all the more reason to do so in an action filed in state court, and then removed to federal court under diversity.

This result should be conclusive in light of the line of cases interpreting Fed.R.Civ.P. 81(c). *Nationwide Engineering & Control Systems v. Thomas*, 837 F.2d 345 (8th Ci. 1988); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677 (9th Cir. 1980); *Nealy v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275 (9th Cir 1980); and *Headrick v. Atchinson T. & S.F. Ry. Co.*, 182 F. 2d 305 (10th Cir. 1950).

Even prior to the adoption of Rule 81(c) this Court held that the transfer of a case from a state court to a federal court "gave the latter court control of the case as it was when the state court was deprived of its jurisdiction." *Clark v. Wells*, 203 U.S. 164 (1906). (Emphasis added)

> "In the nature of things the Federal Civil Rules do not govern procedure until 'after removal'; and accordingly some adjustment must at times be made that will appropriately reflect the combined effect of state practice and post-removal federal practice." 1A Moore's Federal Practice, 0.157 (10.1).

See also *Wright and Miller*, Sec. 1024; 6A West's Federal Practice Manual 2nd Edition, Sec. 7627 (2nd Ed., 1983).

In *Nealy*, 662 F.2d at 1281-1282, the Plaintiff filed a personal injury action in state court, but did not serve defendants with a summons and complaint until two years later. After service, defendants removed the action on diversity, and then moved in the federal district court to dismiss for failure to prosecute, which was granted. The Ninth Circuit Court of Appeals said there was no unreasonable delay here because, before removal, an action is governed by state procedure, which in this case under California law would permit service to be made up to three years after the action was filed.

The District Court's finding in O'Quinn that four months was beyond a reasonable time was clearly erroneous when Rule 81(c) is applied to the reasoning process. The only

time requirement imposed by Colorado Rules of Civil Procedure 3(a) is "reasonableness" and the Colorado Court of Appeals has held that a nearly two year delay for service after filing the Complaint was reasonable. *Nelson v. Blacker*, 701 P.2d 135 (Colo. App. 1985).

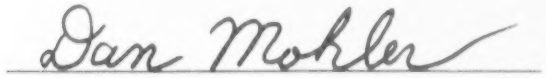
Justice Jackson eloquently summed up O'Quinn's plea here for direction and clarity regarding the inroads threatening the great Constitutional Doctrine of Federalism in *Herb*, 324 U.S. at 125-128:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds... The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction...."
>
> "...it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended. If this imposes an unwelcome burden it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference as well as to protect our own from unwitting renunciation."

CONCLUSION

For the reasons enumerated above this Petition For Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 7th day of August 1992.



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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHIRLEY O'QUINN and
FIDELITY AND CASUALTY COMPANY,
Plaintiffs – Appellants,

v. No. 91-1165

WEDCO TECHNOLOGY INC., a New Jersey corporation,
Defendant – Appellee.

ORDER
Entered May 11, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: Patrick Fisher
Chief Deputy Clerk

FILED
United States Court of Appeals
Tenth Circuit

FEB 11 1992

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHIRLEY O'QUINN and
FIDELITY AND CASUALTY COMPANY,
Plaintiffs – Appellants,

v.

WEDCO TECHNOLOGY INC.,
a New Jersey corporation,
Defendant – Appellee.

No. 91-1165
(D. C. No. 90-C-1014)
(Dist. Colo.)

ORDER AND JUDGMENT*

Before SEYMOUR, ANDERSON and BALDOCK, Circuit Judges.

The parties have stipulated that we may decide this case on the briefs. After examining the briefs and appellate record, we have determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiffs appeal from an order of the district court dismissing their action for failure to file it against defendant Wedco

Technology Inc. within the applicable statute of limitations. We have carefully considered plaintiffs' arguments and authorities, but we are not persuaded that the district court erred. We affirm substantially for the reasons set forth by the district court in *O'Quinn v. Wedco Technology, Inc.*, 752 F. Supp. 984 (D. Colo. 1990). The mandate shall issue forthwith.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
DEC. 21, 1990
JAMES R. MANSPEAKER
CLERK
BY_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 90-C-1014

SHIRLEY O'QUINN, and FIDELITY & CASUALTY COMPANY
Plaintiff

VS.

WEDCO TECHNOLOGY, INC.,
Defendant

JUDGMENT

PURSUANT TO and in accordance with the Memorandum Opinion and Order entered by the Honorable Jim R. Carrigan, United States District Court Judge, on December 14, 1990, it is

ORDERED that Defendant's Motion for Summary Judgment is granted; Plaintiff's complaint and action are dismissed; and each party to bear her or its own costs.

DATED at Denver, Colorado, this 21st day of December, 1990.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk

By: Stephen P. Ehrlich (signature)
Stephen P. Ehrlich
Chief Deputy Clerk

FILED: UNITED STATES DISTRICT COURT
DENVER, COLORADO
DEC. 14, 1990
JAMES R. MANSPEAKER
CLERK
BY_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 90-C-1014

SHIRLEY O'QUINN, et al.,
Plaintiff

VS.

WEDCO TECHNOLOGY, INC.,
Defendants.

MEMORANDUM OPINION AND ORDER

CARRIGAN, J.

Shirley O'Quinn commenced this products liability action in the state district court for El Paso County, Colorado, against "Doe Corporation." On May 16, 1988, O'Quinn amended her complaint and named Wadell Equipment Manufacturing as the defendant. No such entity exists, and therefore no service was completed. A second amended complaint was filed naming Wadell Machine & Took, Inc. ("Wadell I") as the defendant. Wadell I was served on September 22, 1988. A third amended complaint, joining Fidelity and Casualty Company as a plaintiff, was filed March 30, 1989.

Asserting that it had no relationship to the company that manufactured the machine O'Quinn was operating when she was injured, Wadell I moved for summary judgment. The state district court granted the motion and simultaneously granted the plaintiffs leave to amend the complaint to name the proper

defendant. On June 4, 1990, a fourth amended complaint was filed naming Wedco Technology Inc. ("Wedco") as the defendant. Wedco was served that day. Pursuant to 28 U.S.C. § 1441, on June 7, 1990, Wedco removed the case to this court.

Asserting that the applicable statute of limitations expired before the plaintiffs filed a complaint against it, Wedco has moved for summary judgment. Plaintiffs have responded by opposing the motion. The parties have fully briefed the issues and oral argument would not materially assist the decision process. Jurisdiction is founded on 28 U.S.C. § 1332.

I. Facts.

The relevant facts are undisputed. In her fourth amended complaint, O'Quinn alleges that she was injured on May 18, 1985, and that the component part that caused her injury had been manufactured by Wadell Equipment Company ("Wadell II"). Wedco subsequently purchased Wadell II. Wedco's first notice of this action was on September 23, 1988, the day O'Quinn served Wadell I. On that day, Dudley M. Harman, a Wedco Vice-President, learned of the lawsuit from a Wadell I employee who believed that the action filed against Wadell I should have been filed against Wedco.

II. Colo. Rev. Stat. § 13-80-127.5

It is undisputed that Colo. Rev. Stat. § 13-80-127.5 is the applicable statute of limitations. In addition, it is undisputed that the claim for relief arose May 18, 1985, and that any action commenced after May 17, 1988, is time barred. However, if the plaintiffs' fourth amended complaint can relate back to a date before May 17, 1988, the complaint is not time barred and the defendant's motion should be denied.

III. Relation Back.

Plaintiffs assert that under Rule 15(c), Colo. R. Civ. P., and *Dillingham v. Greeley Pub. Co.*, 701 P. 2d 27 (Colo. 1985), the fourth amended complaint relates back to her previous complaints and

was therefore timely filed. Wedco asserts that under Rule 15(c), Fed. R. Civ. P., and *Schiavone v. Fortune*, 477 U.S. 21 (1986), the fourth amended complaint does not relate back and therefore the action is time barred. The parties' briefs center on which should apply, the federal or state rule. Because I conclude that the result would be the same applying either rule, I need not decide that issue.[1]

A. Rule 15(c) Fed. R. Civ. P.

Rule 15(c), Fed. R. Civ. P. provides in relevant part that:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action...and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

It is undisputed that on September 23, 1988, Wedco received notice of the action and "knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against [it]." *Id.* Further, it is uncontested that if the federal rule applies, under *Schiavone*, Wedco was not timely informed, the fourth amended complaint cannot relate back and the action is time barred. However, as stated above, the plaintiffs assert that the Colorado rule should apply, and that if applied, the fourth amended complaint can relate back.

B. Rule 15(c), Colo. R. Civ. P.

The Colorado Rules of Civil Procedure were modeled after the federal rules, and Rule 15(c), Colo. R. Civ. P., is substantially

identical to Rule 15(c) Fed. R. Civ. P. *Dillingham*, 701 P.2d at 31-32. In *Dillingham*, the Colorado Supreme Court held that "notice 'within the period provided by law for commencing the action' specified in C.R.C.P. 15(c) includes the reasonable time allowed for service of process." *Id.* at 32. In so holding, the court was persuaded by the Second Circuit's reasoning in *Ingram v. Kumar*, 585 F.2d 566 (2d Cir. 1978) *cert. denied* 440 U.S. 940 (1979). However, both *Ingram* and *Dillingham* were decided before *Schiavone*. I conclude that if the Colorado Supreme Court considered the question today, the court again would follow the applicable federal rule. That rule now is expressed by *Schiavone*, not *Ingram*.

Even if the Colorado Supreme Court declined to follow *Schiavone* and *Dillingham* controlled, the result would be the same. In *Dillingham*, the plaintiff filed a libel action on March 27, 1981, three days before the statute of limitations expired, against the "Tribune-Republican Publishing Company." Asserting that it had been dissolved and had ceased doing business before the allegedly libelous article was printed, the defendant moved for summary judgment. Affidavits filed in support of the motion established that the Greeley Publishing Company was the owner of the newspaper on the date of the alleged libel.

On September 8, 1981, the plaintiff moved to amend the pleadings under Rule 15(c), Colo. R. Civ. P., to name the correct defendant. The trial court granted the motion to amend, but held that the amendment did not relate back to the date of the original complaint because the new defendant had not received notice of institution of the action before the statute of limitations expired. The state court of appeals affirmed.

In reversing the court of appeals, the supreme court held that notice received within "the period provided by law for commencing the action" includes a reasonable time allowed for service of process. *Dillingham*, 701 P.2d at 32. Unfortunately, the court did not define "a reasonable time." In *Dillingham*, the defendant admitted that it had received notice of the filing of the lawsuit one day after the statute of limitations had expired. Here, however, Wedco did not receive notice of the action until

September 23, 1988, over four months after the statute of limitations had expired. Without deciding how long a reasonable time for service of process is under *Dillingham*, I conclude that more than four months is beyond a reasonable time.[2] Therefore, applying *Dillingham*, the fourth amended complaint cannot relate back to the previous complaints.

Accordingly, IT IS ORDERED that:

(1) Defendant's motion for summary judgment is granted;

(2) Plaintiff's complaint and action are dismissed; and

(3) Each party shall bear her or its own costs.

Dated at Denver, Colorado, December 14, 1990.

BY THE COURT:

Jim R. Carrigan (signature)
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

[1]I note, however, that most courts that have considered this question, including this court, have concluded that this is a question of federal procedure. Therefore, under *Hanna v. Plumer*, 380 U.S. 460 (1965), it is governed by the federal rules. *See Brown v. E.W. Bliss Co.*, 818 F. 2d 1405 (8th Cir. 1987); *American Banker's Ins. Co. v. Colorado Flying Academy, Inc.*, 93 F.R.D. 135 (D. Colo. 1982); and 3 *Moore's Federal Practice* § 15.15 (Second Edition 1989) ("The more widely held and, we submit, the correct view is that Hanna v. Plumrner is dispositive of the issue and that the matter is procedural, not within *Erie*, and one solely of federal practice under Rule 15(c)).

[2]It should be noted that under Rule 4(j), Fed. R. Civ. P., a plaintiff has only 120 days to serve a defendant. It is unlikely that the Colorado Supreme Court would hold that any time in excess of 120 days is "reasonable" under Rule 15(c).

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

APR 1 - 1991

JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 90-C-1014

SHIRLEY O'QUINN, et al.,
Plaintiff(s),

v.

WEDCO TECHNOLOGY, INC.,
Defendant(s).

MINUTE ORDER — JUDGE JIM R. CARRIGAN

Plaintiff's motion to alter or amend judgement is denied.

A copy of this Minute Order was mailed to:

Alan Higbie, Esq.
711 S. Tejon
Colorado Springs, CO 80903

K. C. Carlson, Esq.
660 Southpointe Court #210
Colorado Springs, CO 80906

Arthur Kutzer, Esq.
400 S. Colorado Blvd. #700
Denver, CO 80222-0833

Dated: April 1, 1991

Jane Trexler (signature)
Jane Trexler, Secretary

FILED: AUGUST 31, 1988

DISTRICT COURT, COUNTY OF EL PASO, STATE OF COLORADO

Case No. 88CV2383 Division No. 8

NOTICE TO COUNSEL OF RECORD

SHIRLEY O'QUINN VS. DOE MANUFACTURING CO, ETC, WADELL EQUIPMENT MANUFACTURING INC,

---

This Court has a Delay Prevention Plan whereby civil cases are reviewed four months after filing date to check progress. This is in furtherance of a more general judicial goal that civil cases are expected to progress and not lie dormant.

You are directed to make progress by:

_X_ Completing service and filing proof of service or explain in writing what difficulties you are having.

_____ Filing a motion for default if service has been completed and no answer has been filed.

_____ Filing a written status report reflecting the posture of the case.

_____ Filing a "NOTICE TO SET" for Status or Pre Trial Conference/Trial by_____ or show cause why that is not appropriate.

_____ Submitting order of (JUDGEMENT/DECREE/ STIPULATION/RETURN OF SALE)

_____ Appearing on _____ at _____ to show cause to the court why this case should not be dismissed.

_____ OTHER:_____

This case will be reviewed again on SEPT. 28 1988 *to see if the above directed information has been filed with my clerk. Room* 330. *Do not file in District Court clerk's office.*

IF NOT – THE CASE WILL BE DISMISSED WITHOUT PREJUDICE WITHOUT FURTHER NOTICE.

BY THE COURT this 31 day of AUGUST, 1988.

Donald E. Campbell (signature)
District Judge

NOTICE SERVED TO:

ALAN HIGBIE
711 S. TEJON ST
COLO SPRINGS 80903

FILED: APRIL 11, 1990

DISTRICT COURT, COUNTY OF EL PASO, STATE OF COLORADO

Civil Action No. 88CV2383, Division 8

ORDER RE: MOTION FOR SUMMARY JUDGMENT: MOTION TO AMEND COMPLAINT

SHIRLEY O'QUINN and FIDELITY & CASUALTY COMPANY,
Plaintiffs,

v.

WADELL MACHINE AND TOOL, INC. a New Jersey corporation, successor by merger or acquisition of WADELL EQUIPMENT COMPANY, INC.,
Defendant.

This matter comes forward upon motion of the Defendant, Wadell Machine and Tool, Inc., for summary judgment. The Court has studied the briefs filed on behalf of the parties.

The Plaintiffs agree that the leading case defining the elements necessary to impose liability upon a successor corporation is *Ruiz v. Excello*, 635 P.2d 415 (Colorado Appeals, 1982). The Plaintiffs do not contend that the elements defined in that case have been established in this case, but rather argue that the law of New Jersey should control and that under that law Wadell Machine and Tool can be held to be a successor corporation under a "product line" theory. No Colorado case discusses that theory, and it does not appear to have been adopted as the law of Colorado.

Because the tort occurred in Colorado, the tort law of Colorado must be applied; however, questions of corporate law defining the existence and obligations of corporate existence would be answered applying the law of the state of incorporation, in this case, New Jersey.

The Plaintiffs do not argue that the corporate code of New Jersey imposes liability upon a purchaser of the name, equipment, and supplies of a corporation for torts committed by the seller prior to the sale. The "product line" rationale is a tort theory and, therefore, will not be applied in this case unless it has been adopted as the law in Colorado. That has not occurred; therefore, the motion of the Defendant, Wadell Machine and Tool, Inc., for summary judgment is granted.

Because the Plaintiffs have experienced difficulty in gaining information concerning the nature of the corporation at the time of the manufacture of the machine allegedly causing injury and the nature of the ownership of that corporation, Plaintiff's motion to amend to add WEDCO Technology Company, Inc. and to amend the complaint to allege its relation to Wadell Equipment Company, Inc. is granted.

Because the motion of Wadell Machine and Took, Inc. for summary judgment has been granted, the name of that Defendant will be stricken from the pleadings hereafter.

Done this 11 day of April, 1990.

Donald E. Campbell (signature)
Donald E. Campbell
District Court Judge

FILED: JUNE 6, 1990

IN THE UNITED STATES DISTRICT COURT
- FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO.

SHIRLEY O'QUINN, and FIDELITY & CASUALTY COMPANY, Plaintiffs

VS.

WEDCO TECHNOLOGY, INC., A New Jersey corporation, Defendant.

NOTICE OF REMOVAL

WEDCO TECHNOLOGY INC., Defendant in the above-named cause, by its attorneys, GREENGARD SENTER GOLDFARB & RICE, respectfully submits this Notice of Removal of the stated cause from the District Court of El Paso County, Colorado, in which it is now pending, to the United States District Court for the District of Colorado.

IN SUPPORT of this Notice of Removal, Defendant respectfully shows the following facts:

1. Said suit was filed in the District Court of El Paso County, Colorado, on May 16, 1988, and was served upon the Defendant on June 4, 1990.

2. Said suit is a civil action, of which the District Courts of the United States have original jurisdiction.

3. Said suit is brought by Shirley O'Quinn and Fidelity & Casualty Company, Plaintiffs, to recover damages for injuries suffered allegedly due to operation of a metal lathe.

4. Said suit is a cause removable from a state court to the United States District Court for the District of Colorado under the provisions of 28 U.S.C. § 1441.

5. The matter in controversy is monetary in nature, and exceeds the sum of $50,000.00, exclusive of costs and interest.

6. At the time of the commencement of the underlying suit sought to be removed and since that time, and now, the Plaintiff, Shirley O'Quinn, is a citizen and resident of El Paso County, Colorado. The Defendant, Wedco Technology Inc., was and is now incorporated and has its principal place of business in the State of New Jersey.

7. Defendant attaches hereto and makes a part of this Notice a copy of the Summons and Complaint of the underlying suit sought to be removed. Said Complaint is attached hereto as Exhibit A. Defendant attaches hereto and makes part of this Notice a copy of the Answer filed in the underlying suit sought to be removed. Said Answer is attached hereto as Exhibit B.

WHEREFORE, Defendant prays that this Court assume jurisdiction in this case and make such order assuming jurisdiction.

GREENGARD SENTER GOLDFARB & RICE

By James E. Goldfarb (signature)
James E. Goldfarb, #8299

By Arthur J. Kutzer (signature)
Arthur J. Kutzer, #18878
Attorneys for Defendant
400 South Colorado Boulevard, Suite 700
Denver, Colorado 80222-0833
(303) 320-0509

I HEREBY CERTIFY that on the 6th day of June, 1990, a true and correct copy of the foregoing Notice of Removal was deposited in the United States mail, postage prepaid, addressed to:

Alan Higbie, Esq.
Law Firm of Melat & Pressman
711 South Tejon
Colorado Springs, Colorado 80903

Kathleen Carlson, Esq.
660 Southpointe Court, Suite 210
Colorado Springs, Colorado 80906

(signature)

28 U.S.C., § 1441; Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

C.R.S., § 13-80-127.5. Limitation of actions against manufacturers or sellers of products. (1) Notwithstanding any other statutory provisions to the contrary, all actions except those governed by section 4-2-725, C.R.S., brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage cause by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product shall be brought within three years after the claim for relief arises and not thereafter.

Fed.R.Civ.P., Rule 3. Commencement of Action.

A civil action is commenced by filing a complaint with the court.

Fed.R.Civ.P., Rule 4. Process

(j) SUMMONS: TIME LIMIT FOR SERVICE. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Fed.R.Civ.P., Rule 15. Amended and Supplemental Pleadings

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirements of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Fed.R.Civ.P., Rule 81. Applicability in General

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

C.R.C.P., Rule 3. Commencement of Action

(a) How Commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons and complaint. If the action is commenced by the service of a summons and complaint, the complaint must be filed within ten days after service. If the complaint is not filed within ten days, the service of summons shall be deemed to be ineffective and void without notice. In such case the court may, in its discretion, tax a reasonable sum in favor of the defendant to compensate the defendant for expense and inconvenience, including attorney's fees, to be paid by the plaintiff or his attorney. The ten day filing requirement may be expressly waived by a defendant and shall be deemed waived upon the filing of a responsive pleading or motion to the complaint without reserving the issue.

(b) Time of Jurisdiction. The court shall have jurisdiction from (1) the filing of the complaint, or (2) the service of the summons and complaint; provided, however, if more than ten days elapses after service upon any defendant before the filing of the complaint, jurisdiction as to that defendant shall not attach by virtue of the service.

C.R.C.P., RULE 15.
AMENDED AND SUPPLEMENTAL PLEADINGS

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within, the period provided by law for commencing the action against him, the party to be brought in by amendment (1) Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Robert DILLINGHAM, Petitioner,

v.

GREELEY PUBLISHING COMPANY
d/b/a Greeley Daily Tribune,
Respondent.

No. 82SC411.

Supreme Court of Colorado,
En Banc.

May 28, 1985.

Rehearing Denied June 24, 1985.

ROVIRA, Justice.

We granted certiorari to review an opinion of the court of appeals, *Dillingham v. Greeley Publishing Co.*, 661 P.2d 700 (Colo.App.1982), which held that an entity sought to be made a party to a lawsuit by an amended complaint under C.R.C.P. 15(c) must receive notice of the institution of the action prior to the expiration of the statute of limitations before such amendment can relate back to the filing date of the original complaint. We reverse.

I.

On March 27, 1981, three days before the one-year limitations period for a libel action expired,[1] the petitioner, Robert Dillingham, filed a complaint in the Weld County District Court alleging that the "Tribune-Republican Publishing Company, a Colorado Corporation doing business as the Greeley Tribune," had libeled him in a March 28, 1980, article. On April 22, 1981, a summons, a copy of the complaint, and a set of interrogatories were served upon Richard Larsen as "publisher and agent for the Defendant...at his place of employment, The Greeley Tribune." The Tribune-Republican Publishing Company filed a motion for summary judgment stating that the Tribune-Republican Publishing Company had been dissolved and had ceased doing business as the Greeley Daily Tribune before the allegedly libelous

article was printed. Affidavits filed in support of the motion established that the Greeley Publishing Company, a Nevada corporation, was the owner of the newspaper on the date of the alleged libel.

Pursuant to C.R.C.P. 15, the petitioner moved to amend the pleadings on September 8, 1981, "to correct a misnomer of the corporate name" of the Tribune-Republican Publishing Company to read: "The Greeley Publishing Company d/b/a, The Greeley Daily Tribune." The trial court granted the Tribune-Republican Publishing Company's motion for summary judgment. It also granted petitioner's motion to amend, but found that the amendment did not relate back to the filing date of the original complaint under C.R.C.P. 15(c) because Greeley Publishing Company did not receive notice of the institution of the action before the expiration of the statute of limitations. In this regard, C.R.C.P. 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, *within the period provided by law for commencing the action* against him, the party to be brought in by amendment (1) Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. (emphasis added).

The trial court thus equated the phrase "within the period provided by law for commencing the action" with the period allowed by the applicable statute of limitations.

Earlier contact between the parties within the limitations period was found by the trial court not to constitute notice of the institution of the action. This contact included a published

retraction which appeared in the Greeley Daily Tribune shortly after the petitioner questioned the publication of the alleged libelous statement. Further, petitioner and representatives of the Greeley Publishing Company participated in a settlement conference one day before the complaint was filed. In short, although the respondent was aware of a potential claim, the trial court found that it had no notice that a lawsuit had been filed prior to the running of the statute. The respondent was found to have received notice only the day after the limitations period had expired, when one of its news reporters examined the case file at the courthouse during the course of his duties.

Since the amended complaint was found not to relate back, it only became operative as of the date of its filing, September 8, 1981, well beyond the expiration date of the limitations period. The trial court then entered an order granting the respondent's motion to dismiss.

The court of appeals affirmed. It also determined that the respondent did not receive notice of the lawsuit until after the limitations period had expired.[2] It held that "notice to an entity sought to be made a party to a lawsuit by amendment under C.R.C.P. 15(c) must be accomplished prior to the running of the statute [of limitations]." *Dillingham*, 661 P.2d at 701.

Petitioner objects to this interpretation of C.R.C.P. 15(c). He contends that the phrase "within the period provided by law for commencing the action" does not require that the substituted party receive notice within the statute of limitations, but allows for relation back where the original complaint was timely filed and the substituted party receives notice within the reasonable time for service of process. Respondent argues that it was entitled to notice within the statute of limitations and asks that we affirm.[3]

II.

Before holding that C.R.C.P. 15(c) required notice within the limitations period in this case, the court of appeals had last applied the rule in a case where the defendants had received

actual notice that a lawsuit had been filed before the statute of limitations had run. *Spiker v. Hoogeboom*, 628 P.2d 177 (Colo.App.1981).[4] In *Spiker*, the plaintiffs initially filed a complaint against a corporate defendant and served process on its president within the limitations period. After the statue of limitations had run, the plaintiff discovered that an earlier partnership, of which the corporation's president was a partner, not the successor corporation which was served process, was the proper defendant. The plaintiff's motion to substitute the individual partners for the corporate defendant was granted. However, the trial court granted the partners' motion for summary judgment and dismissed the action, determining that the plaintiff's failure to substitute the individual partners for the corporation within the applicable limitations period precluded relation back under C.R.C.P. 15(c). The court of appeals reversed. Paraphrasing the rule, it held that before relation back could be achieved, C.R.C.P. 15(c) prescribed the following:

> (1) the amended complaint must arise out of the same transaction or conduct set forth in the original proceeding; (2) the substituted party must receive such notice of the action within the period allowed by the applicable statute of limitations that he would not suffer prejudice; and (3) the substituted party knew or should have known that the action would have been brought against him if the plaintiff had not made a mistake concerning the identity of the proper party.

628 P.2d at 178.5 The court of appeals then found that the partnership and the corporation, as past and present forms of the same enterprise, had sufficient "identity of interest" that service on the corporation within the limitations period constituted such notice to the partnership that the individual partners would not suffer prejudice. *See* C. Wright & A. Miller, *Federal Practice and Procedure* § 1499 at 517 (1971) (identity of interest means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of litigation to the other.

In the instant case, Dillingham filed his original complaint within the limitations period, but did not serve the Greeley Daily Tribune's publisher, Larsen, until after the statute had run. In addition, the Greeley Daily Tribune reporter who examined the court files did not discover that the lawsuit had been filed until one day after the expiration of the limitations period. Therefore, unlike the defendants substituted in *Spiker*, the Greeley Publishing Company was found not to have had any notice of the institution of the action until after the statute had run. Relying on its interpretation of C.R.C.P. 15(c) in *Spiker*, the court of appeals found this fact barred the amendment from relating back to the filing date of the original complaint, and concluded that notice must be accomplished prior to the running of the statute.

In so holding, the court of appeals joined those federal courts interpreting the identical federal rule,[6] including the tenth circuit, which have held that the language "within the period provided by law for commencing the action" specified in 15(c) refers to the applicable statute of limitations. *Archuleta v. Duffy's Inc.*, 471 F.2d 33 (10th Cir. 1973); *McClanahan v. American Gilsonite Co.*, 494 F.Supp. 1334 (D.Colo.1980). *See also Cooper v. United States Postal Service*, 740 F.2d 714 (9th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 2034, 85 L.Ed.2d 316 (1985); *Ringorse v. Engelburg Huller Co.*, 692 F.2d 403 (6th Cir.1982); *Simmons v. Fenton*, 480 F.2d 133 (7th Cir.1973). Subsequent to *Dillingham*, this literal approach, which requires the substituted defendant to receive actual notice before the expiration of the limitations period, even where the filing of the complaint tolls the statute, has been followed in *Marriott v. Goldstein*, 662 P.2d 496 (Colo.App.1983), and in *Medina v. Schmutz Manufacturing Co.*, 677 P.2d 953 (Colo.App.1983). The court of appeals has not addressed decisions by other federal courts which have held that the period in which notice must be received under 15(c) includes the reasonable time allowed under the federal rules or applicable state law for service of process. *Ingram V. Kumar*, 585 F.2d 566 (2d Cir.1978), *cert. denied*, 440 U.S. 940,99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir.1980); *Dutka v. Southern Railway Co.*, 92 F.R.D. 375 (N.D.Ga.1981); *Swann Oil, Inc. v. M/S Vassilis*, 91 F.R.D. 267 (E.D.N.C.1981); *Clark v. Southern Railway Co.*, 87 F.R.D. 356

(N.D.Ill.1980). *See also Hedlund v. Holmes Tuttle Broadway Ford, Inc.*, 130 Ariz. 237, 635 P.2d 525 (Ariz.App.1981); *Waybrant v. Clackamas County*, 54 Or. App. 740, 635 P.2d 1365 (1981).

[1,2] We are persuaded by the Second Circuit's reasoning in *Ingram v. Kumar*, 585 F.2d 566 (2d. Cir.1978), *cert. denied*, 440 U.S. 940, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979), where it held that the rule 15(c) requirement that notice be received "within the period provided by law for commencing the action" includes the reasonable time allowed for service of process. There, the court stated:

> Although on its face the phrase, 'within the period provided by law for commencing the action against him,' seems to mean the applicable statute of limitations period, such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not receive actual notice of the action against him prior to the running of the statute of limitations. Yet there is no doubt that the action against him is timely commenced. There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly.

585 F.2d at 571 (footnote omitted). We agree that such a result is anomalous and is not required by the rule. Greeley Publishing Company should not be given an advantage it would not have received had it been named correctly in the original complaint. Colorado is among those jurisdictions where timely service of process can be effected after the statute of limitations has run. *See* C.R.C.P. 3; C.R.C.P. 4. *See also Mascitelli. Giulano & Sons Coal Co.*, 157 Colo. 240, 402 P.2d 192 (1965) (generally, filing of a pleading or a motion is effective to stop the running of specified time limitations). Therefore, we hold that notice "within the period provided by law for commencing the action" specified in C.R.CP. 15(c) includes the reasonable time allowed for service of process.

This approach is consistent with C.R.C.P. 15(a)'s admonition that courts shall grant leave to amend pleadings "when justice so requires" and the policy that technical errors not affecting the substantial rights of parties should be disregarded. Early on, the United States Supreme Court noted that the federal rules of civil procedure, after which the Colorado rules are patterned, rejected "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept[ed] the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson* 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). This court has previously applied a more flexible standard for amendment of pleadings where the substitution of parties is not involved. *Eagle River Mobile Home Park Ltd. v. District Court*, 647 P.2d 660 (Colo.1982) (proposed amendment set forth additional damages and alternative theories of recovery); *Varner v. District Court*, 618 P.2d 1388 (Colo.1980) (alternative theories of recovery). *See also Moses v. Moses*, 180 Colo. 397, 505 P.2d 1302 (1973) (procedural rules as a whole should be interpreted liberally and technical errors not affecting the substantial rights of the parties should be disregarded).

[3] The purpose of the statute of limitations in promoting justice, discouraging unnecessary delay, and forestalling the prosecution of stale claims, *Klamm Shell v. Berg*, 165 Colo. 540, 441 P.2d 10 (1968), is not defeated by allowing the substitution of a party within a reasonable period of time after the limitations period has expired. The original complaint must still be timely filed. Nor does the allowance of a reasonable period of time for service of process adversely affect the substituted party. That party is adequately protected by C.R.C.P. 15(c) which requires: (1) the claim or defense asserted arise out of the same events set forth in the original pleading, (2) the party brought in must receive such notice of the institution of the action that it will not be prejudiced in maintaining its defense on the merits, and (3) the party knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it.

[4] Greeley Publishing Company, through its publisher's affidavit supporting Tribune-Republican Publishing Company's motion for summary judgment, admits that it had notice of the filing of the lawsuit one day after the statute of limitations had run. We find this notice was received within the reasonable period of time allowed for service of process. Consequently, Dillingham's amended complaint is not barred by the statute of limitations.

Marriott v. Goldstein, 662 P.2d 496 (Colo.App.1983) and *Medina v. Schmutz Manufacturing Co.*, 677 P.2d 953 (Colo.App.1983), are overruled to the extent inconsistent this opinion. Accordingly, the judgment is reversed and the cause is remanded to the court of appeals for further proceedings consistent with this opinion.

1. Section 13-80-102, 6 C.R.S. (1973), the statute of limitations for libel actions provides:

   All actions for assault and battery, false imprisonment, slander, and libel shall be commenced within one year after the cause of action accrues, and not afterwards.

   The cause of action accrued on March 28, 1980, the date the alleged libel occurred. *Spears Free Clinic & Hospital for Poor Children v. Maier*, 128 Colo. 263, 261 P.2d 489 (1953). However, the one-year statute of limitations did not expire until March 30, 1981, because March 28, 1981, was a Saturday. *See* C.R.C.P. 6(a).

2. The court of appeals found that the respondent did not receive notice until twenty-two days after the expiration of the limitations period when the publisher Larsen was served with the original pleadings. Although this finding is at odds with the trial court's finding that the respondent received notice one day after the limitations period, this difference does not affect the resolution of this case. Both courts relied on the fact that the respondent did not receive notice of the filing of the lawsuit within the limitations period to bar the petitioner's amended complaint from relating back to the filing date of the original complaint.

3. Greeley Publishing Company also argues that the amendment to Dillingham's Complaint cannot be characterized as correcting a "misnomer" of the corporate defendant as Dillingham asserted in his motion to amend, but rather was an amendment which changed the party against whom his complaint charged. Greeley Publishing's second argument is directed at those cases which have held that mere "misnomers" can be corrected under the first sentence of subsection 15(c) and need not meet the timing and notice requirements set out in the second sentence for "changing the party." *See, e.g., Graves v. General Insurance Corp.*, 412 F.2d 583 (10th Cir. 1969); *Wentz v. Alberto Culver Co.*, 294 F.Supp. 1327 (D.Mont.1969); *Armijo v. Welmaker*, 58 F.R.D. 553 (D.Ariz.1973). *Cf. Archuleta v. Duffy's Inc.*, 471 F.2d 33 (10th Cir. 1973) (substitution of parties); *Travelers Indemnity Co. v. United States ex rel. Construction Specialities Co.*, 382 F.2d 103 (10th Cir. 1967) (misnomer). We need not decide whether the amended complaint is properly characterized as correcting a "misnomer" or "changing the party" because Dillingham has argued here that all of the timing and notice requirements of the second sentence of C.R.C.P. 15(c) were met. We note, however, that when the identical provision of the federal rule, Fed.R.Civ.P. 15(c), was amended in 1966 by the addition of the second sentence, it was "amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall 'relate back' to the date of the original pleading." Fed.R.Civ.P. 15(c) Notes of Advisory Committee on Civil Rules, *reprinted in*, 39 F.R.D. 82 (1966).

4. *Spiker* expressly distinguished itself from those cases where the original party was served after the running of the statute of limitations. 628 P.2d at 179.

5. The court of appeals also found in *Spiker* that the defendants misled the plaintiffs into thinking that the corporation was the proper party by admitting in their answer that the corporation had performed those acts giving rise to the cause of action. It

held that if the originally named defendant or the party sought to be added either knowingly allows the plaintiff to think he has sued the proper party or actually misleads him as to the identity of the party that should be held responsible, the new defendant will be estopped from asserting a statute of limitations defense. 628 P.2d at 179.

6. C.R.C.P. 15 is substantially identical to Fed.R.Civ.P. 15.

Supreme Court, U.S.
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No. 92-310

In The

Supreme Court of the United States

October Term, 1992

SHIRLEY O'QUINN,

Petitioner,

v.

WEDCO TECHNOLOGY, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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No. 92-310

In The

Supreme Court of the United States

October Term, 1992

SHIRLEY O'QUINN,

Petitioner,

v.

WEDCO TECHNOLOGY, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

Respondent, Wedco Technology, Inc.,[1] respectfully requests that this Court deny a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals For the Tenth Circuit.

JURISDICTION

Jurisdiction of this Court is sought by Petitioner under 28 U.S.C. § 1254(1) (Supp. 1992). S. Ct. R. 13.1

[1] Pursuant to S. Ct. R. 29.1, Wedco Technology, Inc., states it has no parent companies or subsidiaries, other than wholly-owned subsidiaries.

provides that petition for a writ of certiorari to review a judgment in any case shall be deemed timely when filed within ninety (90) days after entry of the judgment. Petitioner's claims were dismissed by the district court on December 21, 1990. A motion to alter or amend judgment was filed December 31, 1990, and denied April 1, 1991. Petitioner filed a notice of appeal on April 29, 1992. On February 11, 1992, the United States Court of Appeals affirmed the district court's judgment in favor of defendant. On February 24, 1992, a Petition For Rehearing and Suggestion For en banc Consideration was filed with the Tenth Circuit which was denied on May 11, 1992.

Federal Rules of Appellate Procedure for the United States Court of Appeals, Rule 35(c) provides that a suggestion for rehearing en banc does not affect the finality of the judgment of the Court of Appeals or stay the issuance of a mandate. Further, S. Ct. R. 13.4 provides that a suggestion for rehearing en banc, pursuant to Rule 35(b), Fed. R. App. P. 35(b), is not a petition for rehearing within the meaning of S. Ct. R. 13.4. This petition was not filed until August 7, 1992, and was docketed on August 17, 1992. Therefore, this petition is not timely pursuant to S. Ct. R. 13.

STATEMENT OF THE CASE

On May 18, 1985, Shirley O'Quinn, the Petitioner, injured her hand while operating two machines at the place of her employment, Texas Instruments in Colorado Springs, Colorado. She first reported her injuries and any alleged cause of her injuries to her employer on May 18,

1985. Petitioner alleges she was operating two machines, a machine lathe and bar feed device. The lathe was allegedly manufactured by Wadell Equipment Company, a defunct corporation alleged to be a predecessor in interest of Wedco. The bar feed was manufactured by Powerhold, Inc., an unrelated Connecticut corporation. Petitioner was injured while operating the Powerhold bar feed, which was not designed, constructed, nor assembled by Wadell Equipment Company.

It is undisputed that the applicable statute of limitations expired on May 18, 1988. Petitioner commenced this action, 23 days before the limitations period ran, by filing a Complaint on April 25, 1988 naming "Doe Manufacturing Company, a/k/a Wadell Company," asserting claims for breach of warranty, strict liability, and negligence. No claim was asserted against Powerhold by Petitioner.

On May 16, 1988, an Amended Complaint was filed, naming Wadell Equipment Manufacturing, Inc., as the only Defendant. Not until September 23, 1988, over four months after the expiration of the limitations period, did Petitioner file and serve a Second Amended Complaint incorrectly naming Wadell Machine & Tool, Inc. (Wadell Machine) as successor in interest to Wadell Equipment Company.[2] The Complaint was served upon Laszlo Rendas, as registered agent for Wadell Machine. On September 23, 1988, through Laszlo Rendas, Wedco received

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[2] Inconsistent with Petitioner's implied difficulty in locating "Wadell," Wadell Machine & Tool, Inc., which purchased certain assets from Wadell Equipment Company, was incorporated and registered as doing business in New Jersey since October, 1987.

its first notice of Plaintiff's claims. Wadell Machine filed a timely answer denying it was a successor to Wadell Equipment Company. A Third Amended Complaint was filed in May, 1989, in which Petitioner's Workers' Compensation carrier, Fidelity & Casualty Company, joined as a co-plaintiff. The El Paso County, Colorado District Court dismissed Wadell Machine on April 11, 1990, since it was not the manufacturer, nor was it the successor in interest to the manufacturer of the machine lathe. On June 4, 1990, over 23 months after Petitioner was on notice that Wadell Machine was not the manufacturer of the machine lathe, and over two years after the statute of limitations had expired, a Fourth Amended Complaint was filed naming Wedco as the sole defendant.

The action was properly removed and the United States District Court For The District of Colorado accepted jurisdiction based on diversity. Applying this Court's decision in *Schiavone v. Fortune*, 477 U.S. 21 (1986), the District Court found: "[It] is uncontested that if the federal rules apply, under *Schiavone*, Wedco was not timely informed, the Fourth Amended Complaint cannot relate back, and the action is time barred." (Petitioner's Appendix 7a.)

The District Court indicated that even accepting Petitioner's position, applying Colorado Rule of Civil Procedure 15(c): "I conclude that if the Colorado Supreme Court considered the question today, the court again would follow the applicable federal rule. That rule now is expressed by *Schiavone*, not *Ingram*." (Petitioner's Appendix 8a.)

The District Court dismissed Petitioner's claims, applying Fed. R. Civ. P. 15(c). The District Court held Petitioner's Fourth Amended Complaint did not relate back and the claims were therefore barred by the statute of limitations; and even applying C.R.C.P. 15(c), as suggested by Petitioner, the same result is reached.

With respect to Petitioners argument that C.R.C.P. Rule 15(c) rather than the Federal Rule applies to a removal action, the District Court specifically pointed out: "Most courts that have considered this question, including this court, have concluded that this is a question of federal procedure." (Petitioners Appendix 9a.)

Significantly, the District Court foreshadowed the subsequent 1991 amendment to Fed. R. Civ. P. 15(c) in holding:

> Without deciding how long a reasonable time for service of process is under *Dillingham* [construing C.R.C.P. 15(c) as including a reasonable time for service] I conclude that more than four months is beyond a reasonable time. Therefore, applying *Dillingham*, the Fourth Amended Complaint cannot relate back to the previous complaints.

(Petitioner's Appendix 9a.)

Plaintiff's motion to alter or amend the judgment of the District Court was denied on April 1, 1991. (Petitioner's Appendix 10a.) Petitioner filed a Notice of Appeal to the United States Court of Appeals For The Tenth Circuit on April 29, 1991. A three-member panel of the Tenth Circuit affirmed the District Court's judgment

on February 11, 1992. Petitioner's suggestion for rehearing en banc was denied on May 11, 1992.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

A. THERE IS NO CONFLICT OF DECISIONS.

There is currently no conflict between this case and any decision of this Court or any Court of Appeals. Petitioner contends certiorari should be granted to "clear up conflicting decisions between the Colorado Supreme Court, the Tenth Circuit, and this Court." Petitioner's contention is unfounded. The Colorado Supreme Court decision upon which Petitioner relies is not in conflict with the Tenth Circuit decision since the state decision predates *Schiavone* and applies a state rule of civil procedure, whereas the Tenth Circuit decision was based on application of a federal rule of civil procedure.

B. THIS CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION.

Petitioner's assertion that this case presents a constitutional question of importance is erroneous. The Petition centers around application and interpretation of a state rule of civil procedure. Further, this Court has recently considered the question presented concerning relation back of amended proceedings pursuant to Fed. R. Civ. P. 15(c). *See Schiavone v. Fortune*, 471 U.S. 21 (1986). Whether construed under Fed. R. Civ. P. 15(c) in effect at the time of the district court's judgment, or under amended Fed.

R. Civ. P. 15(c) which incorporates Petitioner's concerns, Petitioner's claims were properly dismissed.

C. THE DISTRICT COURT CORRECTLY APPLIED Fed. R. Civ. P. 15(c) IN DISMISSING PETITIONER'S CLAIMS.

The petition asks this Court to find that Colorado Rule of Civil Procedure 15(c) applies to a diversity case, and that the Colorado Supreme Court would diverge from this Court's interpretation of the identically worded federal rule and subsequent amendments to the Federal Rule. Contrary to Petitioner's contentions, the district court correctly applied Fed. R. Civ. P. 15(c) as required by *Hanna v. Plumer*, 380 U.S. 460 (1964), and as interpreted by this Court in *Schiavone v. Fortune*, 477 U.S. 21 (1986). Fed. R. Civ. P. 15(c) covers the situation presented and must be applied unless the Rule exceeds the terms of the Enabling Act or Constitutional restrictions. In any event, Petitioner's concerns have been addressed by new Fed. R. Civ. P. 15(c), which now provides that the period in which a defendant must have notice of the claim for it to relate back includes the period for service provided by Rule 4, 120 days. Even applying amended Fed. R. Civ. P. 15(c), Petitioner's claims were properly dismissed. Lastly, as the District Court indicated, even applying state Rule 15(c), in light of *Schiavone*, Petitioner's claims were properly dismissed.

ARGUMENT

Petitioner asks this Court to find that, despite a federal rule which clearly encompasses this issue, the Colorado Rules of Civil Procedure should govern.

However, this Court has long held that where there is a conflict between a federal rule of civil procedure and a corresponding state rule on procedural matters, the federal rule applies. *Hanna v. Plumer*, 380 U.S. 460 (1964).

> When a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the Enabling Act nor constitutional restrictions.

Hanna v. Plumer, 380 U.S. 460, at 471 (1964). This Court confirmed adherence to this analysis in *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987). It is suggested that the constitutional authority of Congress to enact Fed. R. Civ. P. 15(c) is not seriously questioned. Therefore, based upon *Hanna*, the validity of Fed. R. Civ. P. 15(c) under the Rules Enabling Act, 28 U.S.C. § 2072, is presumed and the federal rules prevail over contrary state practice.

In *Schiavone v. Fortune*, 477 U.S. 21 (1986), this Court considered the very issue presented in this case. Under *Schiavone*, the newly added defendant must have notice of the claims within the limitations period before an amended complaint adding him as a defendant will relate back. Applying *Schiavone*, the district court held: "Under *Schiavone*, Wedco was not timely informed, the Fourth

Amended Complaint cannot relate back, and the action is time barred." (Petitioner's Appendix 7a).

Petitioner's reliance upon *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), is misplaced. *Walker* involved a dispute over the application of the appropriate statute of limitations to a personal injury suit. Walker timely filed his complaint in the Oklahoma District Court, but did not serve Armco until four months later. The Oklahoma statute of limitations required service within 60 days of filing. Walker argued that under Fed. R. Civ. P. 3, his action was commenced at filing, tolling the limitations period. This Court reversed, finding that both Fed. R. Civ. P. 3 and the Oklahoma statute could exist side-by-side without conflict, and, therefore, the *Hanna* analysis did not apply. *Walker v. Armco Steel Corp.*, 446 U.S. at 752. This Court has recast the *Hanna* analysis so as not to require even a direct conflict, but to require application of the procedural rule whenever a federal rule "covers the point in dispute." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). Moreover, the *Walker* decision points out that Rule 3, rather than the state statute concerning service, governs in a diversity action. The federal rules provide various timing requirements, though not replacing the requirements of the state limitations period. *Walker v. Armco*, 446 U.S. at 751, 752.

Here, the *Hanna* decision is determinative of the question presented.

> Thus, a court, in measuring a federal rule against the standards contained in the Enabling Act and the Constitution, need not blind itself to the degree to which the rule makes the character and the result of the federal litigation stray from

> the course it would follow in state courts. . . . To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

Hanna v. Plumer, 380 U.S. at 473. The District Court properly dismissed Petitioner's claims in applying Fed. R. Civ. P. 15(c).

Further, Fed. R. Civ. P. 81(c) relied upon by Petitioner does not support her position. Rule 81(c) requires application of the Federal Rules of Civil Procedure in a removal case, rather than state rules.[3] Although Petitioner correctly points out that the federal rules do not apply prior to removal, this Court has previously acknowledged the propriety of applying federal rules following removal, despite differences in state court practice.

> The petitioner having removed his case into the Circuit Court has a right to have it further progress governed by the law of the latter Court, and not by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed.

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[3] *See* 28 U.S.C. § 81 (Supp. 1992); *Freeman v. Bee Machine Co.*, 319 U.S. 448, 452 (1943) (holding that authority to permit amendments to complaint is governed by federal not state law); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423 (1974).

Ex parte Fisk, 113 U.S. 713 (1885). Obviously, when a Federal Court applies the federal rules to regulate the form and conduct of diversity proceedings, a system is employed which may differ from state proceedings. Because the procedures differ, so may the outcome. However, outcome determination has never been an Enabling Act gauge. *Hanna v. Plumer*, 380 U.S. 460, 473 (1965). As noted by the district court dismissing Petitioner's claims, the widely held and correct view is that the issue of relation back is governed by Fed. R. Civ. P. 15(c). (Petitioners Appendix 9a.) *See In re Asbestos School Litigation*, 768 F. Supp. 146 (E.D. Pa. 1991). Other federal courts have taken the same approach.

Smith v. Navistar International Transportation Corp., 737 F. Supp. 1446 (D. Md. 1988), involved a diversity action which had been removed from a Maryland state court. The plaintiff brought product liability claims against Navistar and Bostrum Seating more than three years after the incident occurred. The defendants had no notice of such claim until served two days after the limitations period had expired. Bostrum Seating, like Wadell in the case at bar, was not incorporated at the time of manufacture, and like Wadell was dismissed since it could not be held liable as a successor corporation. Smith filed an amended complaint to add Bostrum, a predecessor to Bostrum Seating, eighteen months after the limitations period had expired. The Court found such facts squarely within the *Schiavone* decision, and applying Fed. R. Civ. P. 15(c), held the claims were time barred.

Similarly, in *Simmons v. South Central Sky Workers Ins.*, 936 F.2d 268 (6th Cir. 1991), the Sixth Circuit considered whether plaintiff's amended complaint in a diversity

action was time barred pursuant to Federal Rule 15(c), or was timely pursuant to Kentucky state law. The court held that the relation back issue is a question of federal law, citing *American Bankers Ins. Co. of Florida. v. Colorado Flying Academy, Inc.*, 93 F.R.D. 135 (D. Colo. 1982). The Eighth Circuit has held similarly, finding that regardless of whether Fed. R. Civ. P. 15(c) conflicts with the state rule, the federal rule applies. *Brown v. E. W. Bliss Co.*, 818 F.2d 1405 (8th Cir. 1987).

Petitioner fails to address the authority presented above. Instead, Petitioner points to unrelated authority, most of which predate *Schiavone*. The decision in *Headrick v. Atchison T. & S.F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950), does not support Petitioner's position. *Headrick* involved a personal injury action filed in a New Mexico state court, which was removed on diversity grounds. Neither Fed. R. Civ. P. 81(c) nor Fed. R. Civ. P. 15(c) were at issue. The only issue presented was the choice of state limitations periods applicable when a removal case is transferred from federal court in New Mexico to federal court in California.

Anderson v. Allstate Insurance Co., 630 F.2d 677 (9th Cir. 1980), also does not support Petitioner's position. In fact, in *Anderson* the court held that plaintiff's amended complaint adding a new defendant did not relate back to the original timely filing and, therefore, plaintiff's claims were dismissed as being time barred. The sole reason for partial reversal of the *Anderson* district court order dismissing plaintiff's complaint was that plaintiff's tortious interference with business relations claim was found to be controlled by a longer statute of limitations, making

the amended complaint timely, and Fed. R. Civ. P. 15(c) a non-issue.

Nealy v. Transportacion Maritima Mexicana S.A., 662 F.2d 1275 (9th Cir. 1980), a pre-*Schiavone*, decision, also fails to support Petitioner's position since it involved neither Fed. R. Civ. P. 15(c) nor a relation back issue. In fact, it was undisputed that Nealy's action was brought within the applicable California statute of limitations, and the only issue on appeal was the court's dismissal of the action pursuant to Fed. R. Civ. P. 41(b), for failure to prosecute.

Significantly, Petitioner refers in passing to a subsequent amendment to Fed. R. Civ. P. 15(c). In 1991, Fed. R. Civ. P. 15(c) was amended. The advisory committee notes indicate the amendment was in direct response to this court's decision in *Schiavone*. Fed. R. Civ. P. 15(c) advisory committee's note. The rule was amended April 30, 1991, with an effective date of December 1, 1991. The District Court properly applied the previous rule to this action, in which the District Court accepted jurisdiction in June, 1990. Modification of the Federal Rule is not appropriately addressed by a grant of *certiorari*, but in any event, Petitioner's concerns have been addressed and codified in Fed. R. Civ. P. 15(c) as amended, which now provides that the period within which a defendant must have notice of the claim for it to relate back includes the period for service provided by Rule 4, 120 days. Fed. R. Civ. P. 15(c)(3). Wedco did not receive notice of Petitioner's claims within 120 days. Therefore, even applying Fed. R. Civ. P. 15(c) as amended, which fully addresses any arguable harshness under the *Schiavone* decision, Petitioner's claims were properly dismissed.

Petitioner contends, without support, that 15(c) of the Colorado Rules of Civil Procedure applies and that the Colorado Supreme Court is unlikely to reverse its *Dillingham* holding. However, *Dillingham v. Greeley Publishing Company*, 701 P.2d 27 (Colo. 1985), pre-dates this Court's contrary holding in *Schiavone v. Fortune*, as well as the 1991 amendment to Fed. R. Civ. P. 15(c). The Colorado Supreme Court in *Dillingham* pointed out that the Colorado Rules of Civil Procedure were patterned after the Federal Rules and the District Court determined as follows: "I conclude that if the Colorado Supreme Court considered the question today, the court again would follow the applicable Federal Rule. That rule is now addressed by *Schiavone* . . . " (Petitioner's Appendix 8a.)

Since the District Court's determination as to the law of the state in which it sits must be given deference, Petitioner's claims were properly held to be time barred. This remains true whether application of the rule is made pursuant to *Schiavone*, or under Fed. R. Civ. P. 15(c), as amended.

CONCLUSION

Pursuant to this Court's decision in *Schiavone*, Petitioner's claims were properly dismissed. Moreover, dismissal was appropriate whether the Court applied Fed. R. Civ. P. 15(c) as interpreted by *Schiavone*, or Rule 15(c) as amended in response to *Schiavone*.

Petitioner attempts to create an issue concerning forum shopping. That federal courts may be closed to

litigation where state courts are open is no novel proposition. In fact, the complete diversity rule and the requisite amount in controversy requirement presuppose such a situation. In addition, the fact that relation back is tied to the statute of limitations only serves to emphasize the appropriateness of the *Hanna* analysis. To the extent Fed. R. Civ. P. 15(c) prohibits federal court adjudication, it serves to make dockets less crowded and evidence fresher. The greater the procedural effect, the stronger the claim that the relevant rule fulfills the purpose described in the Rules Enabling Act. *Hanna* established that the presumption of validity accorded the Federal Rules can be rebutted only if the rule exceeds the bounds of the Constitution or if substantive rights are abridged in violation of the Enabling Act. Further, *Hanna* seeks to put to rest the threat to the uniformity and independence of the federal rules from state procedure. By her petition, Shirley O'Quinn seeks to have this Court replace the federal rules with a mosaic of state procedures. The need for uniformity is too important a goal to begin sliding down such a slippery path.

Respectfully submitted,

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